SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 185

PENNSYLVANIA-READING SEASHORE LINES,
Petitioner,

vs.

HILDEGARDE CAWMAN, ADMX. ESTATE OF JOHN W. CAWMAN, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALFRED E. DRISCOLL,
Counsel for Petitioner.

INDEX.

Subject Index.

Index of Cases.

Statutes and Codes.

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HILDEGARDE CAWMAN, ADMINISTRATRIX OF THE ESTATE OF JOHN W. CAWMAN, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioner, Pennsylvania-Reading Seashore Lines, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit (No. 126) entered on March 27, 1940 (R. 211), reversing a judgment of the United States District Court for the District of New Jersey, entered upon a directed verdict in favor of the petitioner (R. 188).

The opinion of the Circuit Court is reported in 110 F. (2d) 832.

Summary Statement of the Matter Involved.

The action in this case to recover damages for the death of Cawman (Jan. 4, 1935) while in performance of his

duties as brakeman in petitioner's service, was brought by respondent, Hildegarde Cawman, Administratrix of the decedent, in the District Court of the United States for the District of New Jersey, under the *Federal Employers' Liability Act, 1908 (35 Stat. 65, U. S. Code, Title 45, Ch. 2, Sec. 51).* The case was tried before the Honorable John Boyd Avis and a jury and resulted in a directed verdict for the defendant, petitioner here (R. 188).

From such judgment appeal was taken by the respondent (R. 193) to the United States Circuit Court of Appeals for the Third Circuit which, after hearing, reversed the judgment of the District Court and granted a new trial.

The trial court, in directing a verdict in favor of the petitioner, relied upon the opinion of this Court in *Baltimore & Ohio R. R. Co.* v. *Berry,* 286 U. S. 272, Cert. granted 285 U. S. 532, where the factual situation was not distinguishable from the instant case. The Circuit Court, while recognizing the full force and significance of the opinion of this Court in *Baltimore & Ohio R. R. Co.* v. *Berry, supra,* suggests, in its opinion reversing the District Court, that a new argument was presented below which was not presented before this Court in the *Berry* case (R. 215).

In both cases an experienced brakeman was injured in the course of his duties as the result of a fall from a bridge or trestle in the night time while his train was on the same. In neither case was there any light, guard rail or catwalk along the outer edge of the bridge although, in the instant case, in contrast to the *Berry* case, we have a bridge with two tracks and a safe walkway between (R. 204).

Your petitioner recognizes the proper reluctance of this Court to grant petitions for certiorari generally and in later years in Employers' Liability cases where the question is one of sufficiency of proof of negligence, interstate commerce and the like, but it respectfully submits that this petition presents "a case of general applicability" involv-

ing the interpretation of the act, the decisions of this Court and the failure of the court below to follow the same.

In main, your petitioner contends: That the Circuit Court of Appeals, in reversing the judgment of the District Court, decided a Federal question in conflict with the applicable decisions of this Court; that the Circuit Court of Appeals, while recognizing the statutory test of liability under the Federal Employers' Liability Act, has construed it as though it were one providing for liability without fault in conflict with the applicable decisions of this Court; that the decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court in this class of cases covering the question of *quantum* of evidence legally required to permit the submission of a case to the jury.

Upon the question raised by petitioner that the District Court was right in directing a verdict in its favor and in relying on the opinion of this Court in *Baltimore & Ohio R. R. Co.* v. *Berry*, 286 U. S. 272, it is necessary, briefly, to review the facts.

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333 (1933);

Atchison, Topeka & S. F. R. Co. v. *Saxon*, 284 U. S. 458 (1932).

Respondent's intestate (hereinafter called Cawman), who was employed by petitioner in interstate commerce as a flagman on a freight train proceeding from New Jersey to Pennsylvania, was injured when he fell while possibly attempting to alight in the night time from a caboose which was standing on a bridge. The bridge in question carried two tracks; one for westbound and one for eastbound trains,

together with a substantial footwalk in the middle. No provision was made for a footwalk on its outer sides (Exh. P-3B, R. 204). Respondent's theory of the case is that Cawman fell to the street below while attempting to leave the caboose because there was no room for a landing or walkway on the outer side of the bridge.

In the instant case, as in the case of *Baltimore & Ohio R. R. Co.* v. *Berry, supra,* Cawman was an experienced brakeman and had been in the employ of the petitioner in that capacity for many years (R. 15). For a number of years Cawman's regular run had been over the line where he was injured (R. 50). He was, moreover, qualified to act as conductor and, in fact, did so act about twice each month (R. 68, 89). The duties of a qualified conductor to operate over the road included knowing the signals, the physical characteristics of the road, the danger points, the obstruction of all bridges or signals or other places where there is danger involved in working over the road (R. 50).

Cawman crossed the bridge, from which he fell, on two occasions each day—once in the morning (R. 52) and once in the late afternoon or early evening (R. 52). When the accident occurred the moon was shining (R. 53) and the night was clear.

Cawman was one of a crew of five men on the train consisting of engine, tender, sixteen freight cars of varying lengths and caboose (R. 28, 29, 58). The train and its crew was operated subject to certain rules promulgated by the petitioner and in force on the night in question and known to the members of the crew. Among these rules the following were particularly applicable:

Rule 99, provided that when a train stopped it was the duty of the rear brakeman to carry with him the necessary warnings and to go back a sufficient distance to safely protect the train (R. 32, 51, 123).

Rule 1410, provided that members of the crew were to "get on or off the side of the car or train away from main track or close clearances when conditions permit" (R. 67).

Rule 1406, provided that members of the crew in "getting off standing equipment were to be sure to have a footing before letting go of the handrail" (R. 52).

Rule 107 provided "in case of doubt or uncertainty the safe course must be taken" (R. 184).

After crossing petitioner's bridge over the Delaware River between New Jersey and Pennsylvania, the train on which Cawman was riding approached Frankford Junction where the line from New Jersey intersects the main line of the Pennsylvania Railroad running from New York to Philadelphia. In the interval between the Delaware Bridge and the Junction, the railroad tracks cross five or six bridges spanning city streets, the last of these bridges being the one where the accident occurred. As the engineer crossed this latter bridge and proceeded along the tracks, which curved decidedly to the left, the interlocking signal at Frankford Junction was at STOP (R. 59). The engineer testified that, pursuant to the rules of the road, his attention was directed ahead and that as he stopped his freight train he gave no consideration to the location of the caboose at the rear of the train (R. 59), nor could he see where the caboose was (R. 61) in view of the fact that his train curved away from his line of vision.

The conductor, with whom the decedent was riding in the caboose, testified that "when the train stopped, Cawman went out with his red and white lights" (R. 31). The conductor, however, was unable to state where the caboose was with relation to the bridge as he was seated at his desk doing some clerical work (R. 30). Thus there was no one in a position to testify as to exactly where the caboose was

when Cawman left it or whether or not he got off the right side or the left side, or whether he fell and was injured as he was leaving the train or when he was coming back to the train after the engineer had whistled for his return. In any event, it was perfectly apparent that he did not take the safe course and that if he did fall as he was leaving the caboose, he must have let go of the handrail before he had secured a footing or ascertained whether he could safely alight at the point chosen.

Both the engineer and the front brakeman who, without knowing anything about the accident, were seeking to find out why Cawman did not answer the whistled summons to return to the caboose, descended from the lefthand side of the cab of the engine and walked back between the tracks (R. 67, 82), crossing the bridge on the footwalk between the two tracks shown in Exh. P-3b (R. 204). There was testimony to the effect that the train did not stop for the signal at the Junction every night but possibly only two or three times a week (R. 65).

At the close of the whole case petitioner moved for a directed verdict. The District Court granted petitioner's motion (R. 188). Upon appeal, the Circuit Court of Appeals held that while the case at bar very closely resembled that of *Baltimore & Ohio R. R. Co.* v. *Berry, supra*, and that, following the latter decision, it was not negligence for the petitioner to stop its train with the caboose on the trestle, it was, nonetheless, for the jury to determine whether or not the failure of the petitioner to maintain a light, guard rail or catwalk along the outer side of the bridge constituted a breach of the obligation imposed by the Employers' Liability Act.

Reasons Relied On for the Allowance of the Writ.

1. The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner, has de-

cided a Federal question in conflict with the applicable decisions of this Court.

Baltimore & Ohio R. R. Co. v. *Berry*, 286 U. S. 272;
Delaware, Lackawanna & Western R. Co. v. *Koske*, 279 U. S. 7, 10;
Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165;
Missouri & Pacific R. Co. v. *Aeby*, 275 U. S. 426, 429;
Atlantic Coast Line v. *Davis*, 279 U. S. 34.

2. The Circuit Court of Appeals, in reversing the judgment entered by the District Court on a direction of verdict in favor of the petitioner, has decided a Federal question in a way in conflict with the applicable decisions of this Court in this class of case when an experienced employe assumes the risk of injury.

Delaware, Lackawanna & Western R. Co. v. *Koske*, 279 U. S. 7, 11;
Chesapeake & Ohio Rwy. Co. v. *Kuhn*, 284 U. S. 44;
Missouri & Pacific R. Co. v. *Aeby*, 275 U. S. 426, 430;
Seaboard Air Line v. *Horton*, 233 U. S. 492, 502.

3. The Circuit Court of Appeals, in reversing the judgment of the District Court in favor of petitioner and remanding the case for a new trial, has decided a Federal question in conflict with the applicable decisions of this Court in those cases on the question of the quantum of evidence legally required to permit the submission of a case to the jury.

Pennsylvania Railroad Co. v. *Chamberlain*, 288 U. S. 333;
Atchison, T. & S. F. R. Co. v. *Saxon*, 284 U. S. 458;
Gunning v. *Cooley*, 218 U. S. 90;
Toledo, St. L. & W. R. Co. v. *Allen*, 276 U. S. 165;
Gulf, M. & N. R. Co. v. *Wells*, 275 U. S. 455, 457;
C. M. & St. P. R. Co. v. *Coogan*, 271 U. S. 472, 474.

4. The Circuit Court of Appeals erred in reversing the judgment of the District Court directing a verdict in favor of the petitioner, on the ground that the respondent's negligence was the proximate and sole cause of his injury and that the judgment of the court below should have been affirmed, has decided a Federal question in conflict with the applicable decisions of this Court in this class of cases where an experienced employe's injury is caused by his sole negligence.

Baltimore & Ohio Railroad Co. v. *Berry*, 286 U. S. 272;
Atlantic Coast Line R. Co. v. *Driggens*, 279 U. S. 787;
Great Northern Rwy. Co. v. *Wiles*, 240 U. S. 444;
Kansas City S. R. Co. v. *Jones*, 276 U. S. 303.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

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